

Decision 02-01-044

January 9, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for Authority, Among Other Things, to Increase Rates and Charges for Electric and Gas Service Effective on January 1, 1999.

Application 97-12-020
(Filed December 12, 1997)

Investigation into the Reasonableness of Expenses Related to the Out-Of-Service Status of Pacific Gas and Electric Company's El Dorado Hydroelectric Project and the Need to Reduce Electric Rates Related To This Non-Functioning Electric Generating Facility.

Investigation 97-11-026
(Filed November 19, 1997)

Application of Pacific Gas and Electric Company for Authority, Among Other Things, to Decrease our Rates and Charges for Electric and Gas Service, and Increased Rates and Charges for Pipeline Expansion Service.

Application 94-12-005
(Filed December 9, 1994)

Order Instituting Investigation Into Rates Charges, and Practices of Pacific Gas & Electric Company's.

Investigation 95-02-015
(Filed February 22, 1995)

ORDER DENYING REHEARING OF DECISION 01-10-031

I. SUMMARY

In this Decision, we deny the Application for Rehearing sought by Pacific Gas & Electric and Company ("PG&E or Company") of Decision (D) 01-10-031 (the "Decision"). In the Decision, we granted rehearing of and modified D.00-02-046, which

was issued as a result of PG&E's 1999 test year general rate case ("GRC") application. That application for rehearing was sought by The Utility Reform Network (TURN). In the Decision, we granted rehearing in a number of areas, both for the purpose of taking additional evidence and making necessary modifications to D.00-02-046. PG&E's only allegation of error is that we allegedly changed the burden of proof from the one adopted in original D.00-02-046 to the one adopted in the decision granting rehearing and that this modification was accomplished without any showing of legal error in TURN's application for rehearing. We find these allegations to be without merit.

II. DISCUSSION.

Applicant's principal argument is that the Commission violated Sections 454(b) and 1708 of the Public Utilities Co. and the due process clause of the United States and California Constitutions by retroactively applying a new standard of proof in its decision on rehearing without prior notice or opportunity for hearing and thereby disallowed tens of millions of dollars in revenues that had previously been approved. A reading of the two decisions, in which we devoted four pages in D.00-02-046 (pages 36-39, mimeo) and eight pages in D.01-10-031 (pages 2-10, mimeo) to this issue demonstrates that we did not change the burden of proof. Rather, the burden of proof applied in the two decisions was the same as we have applied to such proceedings in the past.

In the Decision, beginning at page four, we dealt with TURN's allegation in its Application for Rehearing of D.00-02-046 that we erred in stating in Conclusion of Law 6: "It is PG&E's obligation generally to support its application through clear and convincing evidence." In agreeing with TURN's argument, we reiterated that the utilities appearing before the Commission have always had the responsibility of justifying their applications with clear and convincing evidence. We further pointed out that under recent changes to the Public Utilities Code enacted by SB 779, concerning the standard of review of Commission decisions by the Courts, it is no longer sufficient for us to simply

rely on “any evidence” to support our decisions, which was also acknowledged by PG&E in its opening brief. As we stated at page 4 of the Decision:

“We are of the view that TURN is correct in its criticism of Conclusion of Law 6. We have historically, although not wholly consistently, applied the clear and convincing burden of proof to utilities seeking general rate increases. We applied the clear and convincing standard to PG&E in this case. This standard is applicable to all aspects of PG&E’s showing.”

We are puzzled by PG&E’s allegation that we have somehow changed the burden of proof in this proceeding because the company, in its application for rehearing, quotes language from D. 00-02-046 where we stated unequivocally that the company was required to meet a clear and convincing standard of evidence. The company further quotes from Northern Cal. Power Company (1912) 1 C.R.C. 315; Southern Counties Gas Company (1952) 51 C.P.U.C. 533; Citizens Utilities Company (1953) 52 C.P.U.C. 637; Park Water Company (1955) 54 C.P.U.C. 498; and Railroad Commission v. Pacific Gas & Electric Company (1938) 302 U.S. 388. All of these cases, together with the others cited by PG&E, unequivocally stand for the proposition that a utility has the responsibility of justifying its application for a rate increase by clear and convincing evidence.

PG&E itself states at page 10 of its application that we did not change the standard of proof but simply modified the wording of Conclusion of Law 6, by changing “generally” to “all aspects,” to more accurately apply the standard applied (emphasis added). The company’s argument that the disallowances in rates that we made in the Decision resulted from a change in the standard of proof is simply without merit. As we reiterated a number of times in both D. 00-02-046 and in the decision that is the subject of this Application for Rehearing, we have never waived, either in these two decisions or in prior decisions cited by Applicants, in our belief that the clear and convincing evidence standard is the correct one to be applied. The allegation, that we changed the burden of proof, is therefore without merit.

PG&E next alleges that we violated Sections 454 (b) and 1708 of the Public Utilities Code¹ because we allegedly changed the burden of proof standard without prior notice or opportunity for comments and then applied that changed standard retroactively. As we pointed out above, we do not agree that there was, indeed, any change in the standard of proof. With regard to the Company's argument that they had no prior notice or opportunity for comments, we would point out that PG&E was served TURN's application for rehearing and, in fact, filed a lengthy response to that application in which the company made essentially the same arguments it is making here. There is no merit to the argument that the Company had no notice or opportunity to be heard on this issue, which was also a major contested issue in the original proceeding in this matter.

Nor is the Company's argument that it was somehow surprised by the alleged change in the burden of proof convincing. The Company points out in detail in its Application beginning at page 3, as we noted above, that the Commission has generally applied the clear and convincing standard. The Company cannot now argue that it was surprised by application of a standard that it acknowledges the Commission has applied.

Finally, PG&E argues that we erred in granting rehearing and modifying D. 00-02-01 without any showing of legal error in the Application for Rehearing of that decision. However, as we pointed out at length in D.01-10-031, beginning at page 3, we acknowledged that TURN had established legal error, because we erred in finding that it was sufficient that PG&E met its burden of proof generally, rather than with respect to each aspect of PG&E's showing. On rehearing, we specifically found that the Company had not met its burden of proof in a number of areas. We therefore granted rehearing in certain areas to take additional evidence and to modify the Decision in others to disallow certain expenses that the Company had not sufficiently justified with its evidence. No citation of authority is required for the proposition that this Commission is required by law to issue its decisions based on sufficient evidence, and that failure to do so constitutes

¹ All statutory references are to the Public Utilities Code unless otherwise indicated.

legal error. In fact, all the decisions cited by Applicant, including those cited above, stand for this proposition. In granting rehearing and modifying the prior decision, we specifically acknowledged that there had been insufficient evidence under the prevailing standard of clear and convincing evidence and that this constituted error justifying rehearing. It was obviously not enough for PG&E to make its case on most but not all the issues. PG&E's argument that we should have construed TURN's application for rehearing as a petition for modification of D. 00-02-046 is further without merit.

Petitions for modification are for the purpose of asking the Commission to make changes to the text of an issued decision. Instead, TURN was alleging legal error in the original Decision and rightly filed an application for rehearing.

An applicant for rehearing is required by both Section 1732 of the Public Utilities Code and our Rule of Practice and Procedure 86.1 to state with particularity the factual or legal errors it is alleging. The Company alleges generally that the supposed change in evidentiary standard will cost it "tens of millions" in reduced revenues. At page 10 of the application, the Company points to two areas where the Commission ordered a reduction in rates. The first is a reduction of \$37.3 million in capital increases. PG&E quotes the Commission's language that a further review of the evidence does not support the original calculation. However, PG&E offers no evidence that this conclusion was in error or resulted from an erroneous application of the burden of proof. The same is true of PG&E's complaint regarding the reduction of the amount approved for accounts services at page 21 of D.01-10-031. The Commission specifically pointed out the evidence it had relied on in arriving at its calculation for this account. Applicant presents no evidence that this calculation was in error, nor that some other figure should have been adopted, and therefore has not complied with Section 1732 or Rule 86.1 with respect to either reduction in rates.

III. CONCLUSION

PG&E has failed to establish any factual or legal errors in D. 01-10-031. The application for rehearing should therefore be denied.

IT IS ORDERED that:

1. Rehearing of D. 01-10-031 is denied.

This order is effective today.

Dated January 9, 2002 at San Francisco, California.

LORETTA M. LYNCH

President

HENRY M. DUQUE

RICHARD A. BILAS

CARL W. WOOD

GEOFFREY F. BROWN

Commissioners